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EXPERT REPORT OF MARK BURGESON

* * *

Population Equality

New York State has a total population of 18,976,457. Based on a 62-seat Senate, the ideal size of a Senate district is 306,072. The overall deviation for the 2002 Senate plan is 9.78%. The average deviation of the 2002 Senate plan is 2.2%. Each and every single district in the 2002 Senate plan is within a 5.0% deviation of the ideal. [See appendix 1.] Under the traditional standards of redistricting, these deviations fall within acceptable standards.

Based on information I have reviewed regarding other redistricting plans, the population deviations of the 2002 Senate plan are well within the normal range for New York State and nationwide. As a comparison, the New York State Assembly plan has an overall deviation of 9.43% and has an average deviation of 2.67%. [See appendix 2.] A check of the National Conference of State Legislatures' (NCSL)website: http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm) indicates that there are 24 states whose upper legislative house's overall deviation exceeds 9%, and 25 states whose lower legislative house's overall deviation exceeds 9%. [See appendix 3.] I have been provided with population summaries for two additional upper house plans and three additional lower house plans with deviations exceeding 9%. [See appendix 4.] With more than half of the state legislative houses having total deviations above 9%, the total deviation of the 2002 Senate plan can hardly be described as unusual.

I have also been provided with the average deviations for each of the state plans with greater than 9% total deviation. [See appendix 5.] Review of this information shows that only one of the 54 plans has a lower average deviation than the 2002 New York Senate plan. The average

Demographic Table - Revis

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Idea Populatio
Plaintiffs' Dist. 01	306020	-52
Plaintiffs' Dist. 02	306020	-52
Plaintiffs' Dist. 03	306020	-52
Plaintiffs' Dist. 04	306020	-52
Plaintiffs' Dist. 05	305966	-106
Plaintiffs' Dist. 06	305966	-106
Plaintiffs' Dist. 07	305967	-105
Plaintiffs' Dist. 08	305967	-105
Plaintiffs' Dist. 09	305967	-105
Plaintiffs' Dist. 10	302270	-3802
Plaintiffs' Dist. 11	302270	-3802
Plaintiffs' Dist. 12	302269	-3803
Plaintiffs' Dist. 13	302269	-3803
Plaintiffs' Dist. 14	302270	-3802
Plaintiffs' Dist. 15	302270	-3802

ed Plaintiffs' Senate Plan

n al on	Deviation Percentage	[Additional Columns Omitted]
	-0.02%	
	-0.02%	
	-0.02%	
	-0.02%	
	-0.03%	
	-0.03%	
	-0.03%	
	-0.03%	
	-0.03%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 16	302269	-3803	-1.24%	
Plaintiffs' Dist. 17	302270	-3802	-1.24%	
Plaintiffs' Dist. 18	302270	-3802	-1.24%	
Plaintiffs' Dist. 19	302270	-3802	-1.24%	
Plaintiffs' Dist. 20	302270	-3802	-1.24%	
Plaintiffs' Dist. 21	302269	-3803	-1.24%	
Plaintiffs' Dist. 22	302270	-3802	-1.24%	
Plaintiffs' Dist. 23	302269	-3803	-1.24%	
Plaintiffs' Dist. 24	302269	-3803	-1.24%	
Plaintiffs' Dist. 25	302271	-3801	-1.24%	
Plaintiffs' Dist. 26	302270	-3802	-1.24%	
Plaintiffs' Dist. 27	302270	-3802	-1.24%	
Plaintiffs' Dist. 28	302270	-3802	-1.24%	
Plaintiffs' Dist. 29	302270	-3802	-1.24%	
Plaintiffs' Dist. 30	302271	-3801	-1.24%	
Plaintiffs' Dist. 31	302271	-3801	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 32	302270	-3802	-1.24%	
Plaintiffs' Dist. 33	302270	-3802	-1.24%	
Plaintiffs' Dist. 34	302269	-3803	-1.24%	
Plaintiffs' Dist. 35	302270	-3802	-1.24%	
Plaintiffs' Dist. 36	302271	-3801	-1.24%	
Plaintiffs' Dist. 37	302269	-3803	-1.24%	
Plaintiffs' Dist. 38	302270	-3802	-1.24%	
Plaintiffs' Dist. 39	312031	5959	1.95%	
Plaintiffs' Dist. 40	306218	146	0.05%	
Plaintiffs' Dist. 41	311538	5466	1.79%	
Plaintiffs' Dist. 42	309961	3889	1.27%	
Plaintiffs' Dist. 43	316361	10289	3.36%	
Plaintiffs' Dist. 44	314862	8790	2.87%	
Plaintiffs' Dist. 45	316334	10262	3.35%	
Plaintiffs' Dist. 46	309725	3653	1.19%	
Plaintiffs' Dist. 47	316644	10572	3.45%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 48	301747	-4325	-1.41%	
Plaintiffs' Dist. 49	315934	9862	3.22%	
Plaintiffs' Dist. 50	316661	10589	3.46%	
Plaintiffs' Dist. 51	303721	-2351	-0.77%	
Plaintiffs' Dist. 52	316662	10590	3.46%	
Plaintiffs' Dist. 53	316481	10409	3.40%	
Plaintiffs' Dist. 54	302684	-3388	-1.11%	
Plaintiffs' Dist. 55	302683	-3389	-1.11%	
Plaintiffs' Dist. 56	315692	9620	3.14%	
Plaintiffs' Dist. 57	315623	9551	3.12%	
Plaintiffs' Dist. 58	305002	-1070	-0.35%	
Plaintiffs' Dist. 59	307538	1466	0.48%	
Plaintiffs' Dist. 60	307538	1466	0.48%	
Plaintiffs' Dist. 61	307539	1467	0.48%	
Plaintiffs' Dist. 62	307539	1467	0.48%	

of the average deviations in these plans is 3.03% for the lower houses and 2.93% for the upper houses, well in excess of the 2.22% average deviation for the 2002 New York Senate plan. Significantly, among the plans with comparable or greater deviations than the 2002 Senate plan are plans ordered into place by federal courts in Texas and New Mexico. New Mexico's two plans have overall deviations of 9.6% and 9.7%, and average deviations of 2.83% and 2.73%. For the Texas house, those figures are 9.74% total deviation and 2.65% average deviation. [See appendix 6.] It is my understanding that Dr. Beveridge did not consider the 2002 Assembly plan, plans ordered by other courts, nor other plans in other states. [Deposition transcript ("Tr.") at 126-29.] He did acknowledge, however, that the total and average deviations of the 2002 Senate plan do not violate equal population principles. [Tr. at 144.]

It has been noted that the slightly overpopulated districts in the 2002 Senate plan are districts 10-38, and that this pattern cannot reasonably be due to random chance. In my experience, the numerous legal requirements and other traditional principles of redistricting will never result in a plan coming together in a random manner. With respect to population equality, I have never understood equality to mean that overpopulated districts must be scattered throughout the state, rather than adjacent to one another.

In my experience, there have been many instances of large groupings of adjacent districts that are either overpopulated or underpopulated. For example, in the 1992 Senate plan, districts 1 through 9 were all underpopulated and districts 10 through 36 were all overpopulated. [See appendix 7.] Similarly, in the 2002 Assembly plan, districts 1 through 21 are all overpopulated and districts 22 through 63 are all underpopulated. [See appendix 2.] And, all the other Senate plans submitted by plaintiffs and/or the Senate Minority underpopulate districts 10 through 38, and two of

those plans overpopulate districts 39-62. [See appendix 8.] As Dr. Beveridge acknowledges [Tr. at 137], this type of pattern in other plans is just as unlikely to happen at random as the pattern in the 2002 Senate plan.

These patterns are almost always due to the "block-on-border" rule. Under the block on border rule in New York's Constitution, the difference in population between two adjacent districts within a county may not be greater than the population of any block on the border. In other words, if two adjacent districts could be made more equal in population by shifting a block on the border from one district to the other, then the rule generally requires that the shift be made. Since it is almost always possible to find blocks of very small populations on the border, the result of this rule is that those two districts will almost always be nearly identical in population. Alterations made to any one of those two districts, moreover, will result in a "ripple effect".

The "ripple effect" refers to adjustments, which are required to other districts when adjustments are made to one or more specific districts. That is, when a change is made to one particular district, that change will almost certainly mandate change to adjacent districts, and then to those adjacent, and so on throughout the entire area. Thus, equality of districts in urban areas can be shown to be the result of "block-on-border" and the "ripple effect", not random chance.

I understand that much of the complaint regarding the 2002 Senate plan revolves around the claim that "downstate" has disproportionate representation. I am not aware of any redistricting principle that makes disproportionality among regions relevant when the deviations between individual districts are small. As we have just seen, redistricting plans in New York typically include regions that are either overpopulated or underpopulated. I also understand that the 2002 Senate plan is being criticized for improper

mathematical "rounding down" of the number of "downstate" Senate districts by a fraction, instead of "rounding up" by a fraction as the Revised Plaintiffs' plan does. Again, I am not familiar with any redistricting principle that focuses on trivial differences among "regions".

If one were to engage in an analysis of different geographic regions, New York State could be broken down into three main geographic regions: Long Island (Nassau and Suffolk counties), New York City (the five New York City counties of Bronx, New York, Kings, Richmond and Queens), and "upstate" (the 55 counties north and west of the Bronx/Westchester county line). As shown in table 1, based on a strict, mathematically-equal apportionment (dividing the region's population by the ideal Senate district size – 306,072), Long Island would be allotted 8.9 Senate districts, New York City would be allotted 26.2 Senate districts and "upstate" would be allotted 26.8 Senate districts.

Table 1.

Region	Population	Pop/Ideal Size	SD Ratios
Long Island	2,753,913	2,753,913/306,072	8.9
New York City	8,008,278	8,008,278/306,072	26.2
Upstate	8,214,266	8,214,266/306,072	26.8

The 2002 Senate plan apportioned Senate districts, based on the above numbers, as follows:

Table 2a.

Region	Ratios	SD's
Long Island	8.9	9
New York City	26.2	26
Upstate	26.8	27

As table 2a shows, the 2002 Senate plan properly apportions control of the appropriate number of Senate districts consistent with the regions' population. There are

two Senate districts (34 and 36), which extend into "upstate" Westchester (total population of both districts in Westchester is 135,033). I agree with Dr. Beveridge that the representatives of such districts can be expected to vigorously represent New York City interests [Tr. at 96-97], such that New York City residents have 26 advocates in the Senate. If the portions extending into Westchester are nevertheless included in the "upstate" numbers, the chart is as follows:

Table 2b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	25.6	+2.2%
Upstate	26.8	27.4	- 2.1%

Comparable tables for the Revised Plaintiffs' plan are contained in tables 3a and 3b.

Table 3a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	27	- 3.1%
Upstate	26.8	26	+3.2%

The two Bronx/Westchester districts in the Revised Plaintiffs' plan are 35 and 36. Table 3b shows the data if the Westchester portions of these districts are included "upstate".

Table 3b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	26.5	- 1.3%
Upstate	26.8	26.5	+1.3%

Thus, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives New York City control of 27 districts where a more proportional apportionment would give New York City control of 26 districts, more in line with the population of the region. In looking at both plans, the differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the New York City region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

If, as Special Master Lacey and Prof. Grofman stated in the hearing before this same Federal panel [May 20, 2002 Tr. at 6, 56], the crucial divide between "upstate" and "downstate" is the Bronx/Westchester line, a slightly different average deviation occurs. Looking at Long Island and New York City as a whole then, one would see that that region would be strictly apportioned 35.2 districts, is allotted 34.6 districts and controls 35 districts under the 2002 Senate plan, as shown in the following table.

Table 4a.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	34.6	+1.6%
Upstate	26.8	27.4	- 2.1%

And the Revised Plaintiffs' plan.

Table 4b.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	35.5	- 1.0%
Upstate	26.8	26.5	+1.3%

Again, as above, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives LI/NYC control of 36 districts where a more proportional apportionment would give LI/NYC control of 35 districts, more in line with the population of the region. In looking at both plans, the

differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the LI/NYC region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

As stated above, to the extent that there is any vague definition of "upstate", Westchester is generally considered an "upstate" county, but for argument's sake, following is a table showing the ratios if Westchester is included with New York City.

Table 5a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	28.6	+2.0%
Upstate	23.8	24.4	- 2.4%

And the Revised Plaintiffs' plan.

Table 5b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	29.5	- 1.1%
Upstate	23.8	23.5	+1.4%

Here again, the 2002 Senate plan overpopulates this region by a fraction of a district, whereas the Revised Plaintiffs' plan underpopulates the region by a fraction of a district. In addition, the New York City/Westchester region under the 2002 Senate plan controls 29 Senate districts, which is more proportionate to its population than the Revised Plaintiffs' plan, which gives the region control of 30 Senate districts.

The most far-fetched definition of "downstate" I have seen includes half of Westchester, Rockland and two towns in Orange County. In my experience, this is the first time the Orange County towns of Warwick and Tuxedo are alleged to have more in common with Brooklyn than with their neighboring Orange County towns of Minisink or Wawayanda. Similarly, I agree with Dr. Beveridge that Ossining (included in "downstate" under this definition) has less in common with New York City than Ossining has with Mount Kisco (included in "upstate" under this definition). [Tr. at 101-02.] The pertinent data for that definition of "downstate" is nevertheless shown in tables 6a and 6b.

Table 6a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	29.6	+2.1%
Upstate	22.9	23.4	- 2.7%

And the Revised Plaintiffs' plan.

Table 6b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	30.5	- 0.9%
Upstate	22.9	22.5	+1.2%

No matter how the regions are defined, the 2002 Senate plan slightly underpopulates "upstate" Senate districts and slightly overpopulates New York City Senate districts, and the Revised Plaintiffs' plan overpopulates "upstate" Senate districts and underpopulates New York City Senate districts. Both plans apportion nine districts to Long Island. As I stated above, I have never known it to be significant whether a plan results in underpopulation or overpopulation of a region by a fraction of a district. I certainly know of no basis for concluding that underpopulation or overpopulation

by 0.6 districts is unacceptable, while underpopulation or overpopulation by 0.4 districts is acceptable.

Since I agree with Dr. Beveridge that neither plan provides New York City with perfect proportionality [Tr. at 69], I have examined whether overpopulating rather than underpopulating New York City districts has an effect on compliance with legitimate redistricting principles. In looking at the enacted plan, one can determine numerous legitimate advantages to overpopulating, rather than underpopulating, the New York City Senate districts:

1. First of all, by slightly overpopulating New York City Senate districts rather than underpopulating New York City (as the Revised Plaintiffs' plan does), the 2002 Senate plan provides almost perfect proportionality in terms of the number of Senate districts entitled to the city and the number of districts controlled by the city. That is, there are 24 Senate districts wholly in New York City and two whose overwhelming majority lie in Bronx County, thus allowing the city to control 26 districts, an almost perfect proportionality. By contrast, the Revised Plaintiffs' plan, which allots 27 districts to the region, is not proportional.

2. In addition, by slightly overpopulating the New York City Senate districts rather than underpopulating them, the 2002 Senate plan creates a much greater proportionality in terms of the number of people eligible to vote, the number of people enrolled to vote and the number of people who actually vote. Although not an attorney, I understand that the equal population principle is commonly known as "one person, one *vote*".

An accurate method of measuring voting strength as per "one person, one vote" is using eligible voters; that is, the voting age citizen population. I understand that Dr. Beveridge has sought to adjust for prison population on the theory that, for equal population purposes, representatives

should not be "given the benefit of people who can't vote." [Tr. at 296.] But Dr. Beveridge did not look at the number of eligible voters or relative voting rates, so he is unable to say that the votes of voters in "downstate" districts are worth less than the votes of voters in "upstate" districts. [Tr. at 159-60.]

Using Dr. Beveridge's table 27, New York State has a citizen voting age population of 12,513,359. [See appendix 9.] Using the same method as used to calculate the ideal Senate district size (total state population divided by 62) to calculate the average citizen population results in an average citizen voting age population per Senate district of 201,828 (12,513,359/62). A table showing the average citizen voting population per Region and average deviations from the average citizen population of the 2002 Senate plan is as follows:

Table 8a.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	184,518	- 8.6%
Upstate	215,470	+6.8%

This table reveals a substantial shift in the deviations from the average citizen voting age populations per Senate district. To emphasize, the average New York City Senate districts in the 2002 Senate plan are *underpopulated* according to citizen voting age population on an average of 8.6%. [Note: Dr. Beveridge's data do not break out by county within district, so the Westchester portion of the 34th and 36th are included in the New York City numbers. If those data were available, the averages would be altered slightly, not significantly. This note applies to tables 8, 9 and 10.] Long Island and "upstate" are overpopulated according to citizen voting age population by 4.5% and 6.8% respectively.

By underpopulating the New York City Senate districts, the Revised Plaintiffs' plan, by necessity, would further increase the negative 18+ citizen deviation for New York City districts and increase the deviation "upstate". This is illustrated in Table 8b, which is taken from Dr. Beveridge's report table 28. [See appendix 10.]

Table 8b.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	177,573	-12.0%
Upstate	223,872	+15.4%

These patterns are even more starkly evident when examining voter enrollment and actual voter turnout. Appendices 11 to 12 contain SAS (Statistical Analysis Software from The SAS Institute) files generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. These files contain enrollment data by Senate district for 1996, 1998 and 2000. There are also files containing statewide election results by Senate district for the 1996 and 2000 presidential elections and the 1998 gubernatorial election. There are three files containing votes cast for state Senate in 1996, 1998 and 2000 by new Senate district. From these files are culled data to examine the average potential voter participation (enrollment) by Senate district for each geographic region. Again, the same methodology is used to calculate the overall statewide average enrollment/votes per Senate district and then to calculate the average enrollment/votes per Senate district in each region and the deviation from the statewide average. Table 9a illustrates the statewide enrollment/votes averages.

Table 9a.

Year	Enrollment	President/Governor	St. Senate*
2000	154,840	112,477	85,432
1998	153,269	80,406	64,786
1996	144,837	103,835	83,035

*Because of the fact that there is voter falloff going down the ballot, differences in Senate district lines, as well as many uncontested races, the State Senate numbers are calculated using the total votes cast minus the Blank/Void/Missing vote.

Table 9b illustrates the average enrollment/votes under the 2002 Senate plan for each geographic Region and year.

Table 9b.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	132,814 (-14.2%)	168,420 (8.8%)
Pres	130,488 (16.0%)	89,827 (-20.1%)	128,284 (14.1%)
St.Sen	107,384 (25.7%)	66,471 (-22.2%)	96,375 (12.8%)
1998			
Enr	167,561 (9.3%)	132,077 (-13.8%)	168,912 (10.2%)
Gov	90,237 (12.2%)	60,488 (-24.8%)	96,310 (19.8%)
St.Sen	79,175 (22.2%)	46,313 (-28.5%)	77,778 (20.1%)
1996			
Enr	156,342 (7.9%)	126,700 (-12.5%)	158,466 (9.4%)
Pres	118,180 (13.8%)	79,899 (-23.1%)	122,103 (17.6%)
St.Sen	101,048 (21.7%)	56,439 (-32.0%)	102,641 (23.6%)

This table clearly illustrates that, in terms of the relative value of potential votes and actual votes cast, the 2002 Senate plan results in greater vote value (i.e. underpopulates) for the New York City Senate districts and lesser vote value (i.e. overpopulates) for the Long Island and "upstate" districts. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is

the equivalent of .69 votes in a district on Long Island and .70 votes in a district "upstate".

Table 10 illustrates the average enrollment/votes per region for the three years, and the deviation from the statewide average for the Revised Plaintiffs' plan.

Table 10.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	127,492 (-17.7%)	175,317 (13.2%)
Pres	130,488 (16.0%)	86,051 (-23.5%)	133,685 (18.9%)
St.Sen	107,384 (25.7%)	63,565 (-25.6%)	100,543 (17.7%)
1998			
Enr	167,561 (9.3%)	126,802 (-17.3%)	175,806 (14.7%)
Gov	90,237 (12.2%)	57,889 (-28.0%)	100,387 (24.9%)
St.Sen	79,175 (22.2%)	44,254 (-31.7%)	81,126 (25.2%)
1996			
Enr	156,342 (7.9%)	121,625 (-16.0%)	164,958 (13.9%)
Pres	118,180 (13.8%)	76,532 (-26.3%)	127,223 (22.5%)
St.Sen	101,048 (21.7%)	53,978 (-35.0%)	106,974 (28.8%)

By underpopulating the New York City Senate districts and overpopulating the "upstate" Senate districts, the Revised Plaintiffs' plan even further exacerbates the inequity between the New York City Senate districts and the "upstate" Senate districts in terms of voter enrollment and actual voter turnout. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is the equivalent of .66 votes in a district on Long Island and .64 votes in a district "upstate".

3. The 2002 population of Queens County is 2,229,379, and is thus entitled to 7.28 ratios (mathematically ideal district sizes). Seven whole districts within Queens results in a district population of 318,483, which has a deviation from the ideal of 12,411, or 4.05%. Six districts or

eight districts drawn wholly within Queens would exceed acceptable deviations: 21.39% and 8.95%, respectively. In the 2002 Senate plan, seven districts are drawn wholly within Queens, and the remaining 19 New York City districts are overpopulated by a minimal 1.69%. The "Composite" plan in Dr. Beveridge's report, table 23, has seven districts drawn wholly within Queens, and the remaining 20 New York City districts are underpopulated by 2.93%. Thus, another advantage of the 2002 Senate plan in the relatively slight overpopulation of the New York City Senate districts is that it allows the county of Queens to remain whole and, at the same time, keeps the remaining New York City districts under 2% deviation. By underpopulating the New York City region, as Plaintiffs seek to do, the choice must be made to either keep Queens whole and approach a 3% deviation for the remainder of the New York City districts (as under the "Composite" plan), or sacrifice the Queens county line (as under the Revised Plaintiffs' plan).

4. Another advantage to the slight overpopulation of New York City Senate districts and the slight underpopulation of the "upstate" Senate districts in the 2002 Senate plan is that it achieves a balance with the 2002 Assembly plan, which underpopulates the New York City Assembly districts and overpopulates the Long Island and "upstate" Assembly districts. The Assembly apportionment is as follows [see appendix 2]:

Table 11.

Region	Ratios	SD's	Avg. Dev.
Long Island	21.8	21	+3.7%
New York City	63.3	65	- 2.6%
Upstate	64.9	64	+1.5%

In light of the underpopulation of the New York City Assembly districts, underpopulation of New York City

Senate districts would have increased the overall "upstate"/"downstate" deviations in the legislature as a whole. An examination of these numbers reveals that a balance of sorts has been achieved when looking at the legislative plan as a whole: the 2002 Senate plan has slightly increased representation (over a strict, mathematically equal apportionment) of "upstate" New York and slightly decreased representation of New York City, and Long Island is almost perfectly apportioned; while the 2002 Assembly plan, to a slightly greater degree, has increased representation on New York City, and decreased representation of Long Island and "upstate".

Taken as a whole, the combined state legislative balance as enacted is as follows:

Table 12a.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	42.7% (90.6/212)
Upstate	43.3%	43.1% (91.4/212)

This shows a slightly *greater* representation percentage for New York City than warranted under strict mathematical precision and a slight underrepresentation for Long Island and "upstate". Table 12b illustrates the same calculations using the Revised Plaintiffs' plan.

Table 12b.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	43.2% (91.5/212)
Upstate	43.3%	42.7% (90.5/212)

Therefore, in terms of total representation in both houses of the New York State Legislature, both the 2002 Senate plan and the Revised Plaintiffs' plan overrepresent

the New York City area. This overrepresentation is greater in the Revised Plaintiffs' plan.

5. Another advantage in the relatively slight underpopulation of "upstate" districts is the fact that by having slightly less population, the geographic size of the districts is also smaller. Generally speaking, this will presumably result in more effective representation, as senators would require less traveling to meet with constituents throughout the district. Under the 2002 Senate plan, the average area of an "upstate" Senate district is 1,765 square miles. By contrast, the average area of an "upstate" Senate district under the Revised Plaintiffs' plan is 1,823 square miles. [See appendix 13.]

6. Yet another advantage of underpopulating rather than overpopulating the "upstate" area is that it serves the neutral principle of avoiding incumbent pairs. The 2002 Senate plan increases the size of the Senate from 61 to 62 seats and adds the new district to New York City. As a result, even with the slight overpopulation of New York City districts, the city has one more district than in the 1990's. Therefore, the overpopulation of New York City districts does not inevitably result in the pairing of incumbents.

By contrast, as acknowledged by Dr. Beveridge [Tr. at 260], an "upstate" incumbent pairing is the inevitable result of underpopulating rather than overpopulating the New York City Senate districts. By overpopulating the "upstate" districts, the Revised Plaintiffs' plan provides "upstate" with one fewer district than in the 1990's, which requires the pairing of at least two "upstate" incumbent Senators. Therefore, serving the important redistricting principle of avoiding incumbent pairs is another advantage of the slight overpopulation of the New York City districts and the slight underpopulation of the "upstate" districts in the 2002 Senate plan.

7. Similarly, by retaining the same number of "upstate" districts as in the 1990's, the 2002 Senate plan better preserves the cores and configurations of existing districts. As discussed below, this was the primary redistricting principle, after compliance with federal law, followed by Prof. Grofman and Special Master Lacey in drawing the Court's Congressional plan.

Appendices 14 and 15 contain "migration" reports generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. They measure the percentage of an "old" (1992 SD) district that is within a newly drawn district, and the percentage of the new district that is made up of population from the old district. (Appendix 16 contains similar reports showing the overlap between the 2002 Senate plan and the Revised Plaintiffs' plan.) For example, in the 2002 Senate plan, the newly drawn 6th Senate district contains 97.3% of the population of the "old" 6th Senate district, and 98.9% percent of the new district 6 is made up of population from the "old" district 6.

Table 13 summarizes the migration reports showing the degree of preservation of existing districts for the 2002 Senate plan and the Revised Plaintiffs' plan "upstate".

Table 13.

Percentage of Population of 1992 Senate Districts contained in the most equivalent district in the newly drawn plans

SD	2002 Sen. Plan	Rev. Plain. Plan
35	84.3%	
37	87.7%	74.6%
38	100 %	57.5%
39	100 %	93.0%
40	98.5%	91.6%
41	100 %	77.2%
42	90.4%	59.2%
43	99.9%	60.8%
44	97.9%	93.6%
45	100 %	69.8%
46	100 %	82.9%
47	90.2%	59.2%
48	98.6%	57.1%
49	86.5%	44.9%
50	98.6%	40.8%
51	76.7%	92.3%
52	96.0%	66.9%
53	83.9%	55.5%
54	95.5%	83.0%
55	92.2%	91.6%
56	88.7%	29.5%
57	97.2%	70.4%
58	70.3%	73.4%
59	82.5%	74.5%
60	80.0%	59.7%
61	100 %	85.1%
62	94.5%	99.9%
AVG	92.2%	70.9%

Accordingly, from the calculations above, under the 2002 Senate plan, with an "upstate" average district size of 299,231, this means, on average, 23,340 people will have different representation in the State Senate than they did in

the 1990's. In the Revised Plaintiffs' plan, that number, based on an average "upstate" district size of 310,048, would rise to an average of 90,224. In "upstate", the Revised Plaintiffs' plan moves almost four times as many people to new districts.

In rearranging the "upstate" districts, due in part to the overpopulation of that area, the Revised Plaintiffs' plan is inconsistent with other principles in addition to preserving the cores of existing districts. Another ancillary principle is the preservation of certain geographical characteristics of Senate districts (e.g. maintaining southern tier districts, a north country district, etc.). One important geographical feature, one that Prof. Grofman mentioned in his affidavit, is the Hudson River. [See appendix 17, paragraph 49e.] The 2002 Senate plan maintains that historical boundary intact south of Saratoga County (where population requirements mandate combinations of towns/counties). [See appendix 18.] The Revised Plaintiffs' plan crosses the Hudson River three times south of Saratoga County. [See appendix 19.]

* * *

Finally, in assessing the advantages of a slight overpopulation rather than underpopulation of the New York City Senate districts, it is important to consider the viability of plans submitted to the Task Force for the Legislature's consideration, especially those which illustrated the underpopulation of New York City Senate Districts versus the overpopulation of "upstate" Senate districts. The public record shows that no such plans for a 62 seat Senate were submitted for consideration until one day before the scheduled redistricting vote. And even when submitting this plan to the Task Force on the day before the scheduled vote, Senator Dollinger made it clear that he was "not submitting this plan as a proposal for the Task Force to consider and adopt" but rather as "a legal benchmark" for the record. [See appendix 20.]

Upon review of this plan, it is clear that there were numerous gratuitous incumbent pairings. Appendix 21 contains reports showing incumbent pairs generated by the Task Force's redistricting application. It is a practical flaw for a plan to have excessive incumbent pairings. For example, Special Master Lacey rejected certain Congressional proposals primarily due to the "lack of political fairness" in the nature of two incumbent pairs that were made necessary by the loss of two districts. [See appendix 22 at 8-9.] The plan submitted by Senator Dollinger at the last minute, however, clearly would have resulted in Democratic partisan advantage by pairing incumbents. The plan paired six of the nine Republican senators on Long Island: Lack/Marcellino, Balboni/Hannon and Skelos/Fuschillo; four "upstate" Republican senators: Rath/Volker and Nozzolio/Hoffmann; in addition, three sets of R/D senators (Onorato/Maltese, Gentile/Marchi and Velella/Gonzalez).

Obviously, in the 10 R/R matchups, five Republican members would be eliminated. Appendix 23 contains SAS reports showing party enrollment and the results of 2000 Presidential election, the 1998 Gubernatorial election and the 1996 Presidential election for each district in the Dollinger 62 seat plan. Similar reports for the enacted plan and the Revised Plaintiffs' plan are contained in appendices 24 and 25, respectively. In the R/D matchups, Democratic incumbent Onorato would clearly defeat Republican Maltese in a district in which Al Gore outpolled George Bush in the 2000 presidential election by 63.0% to 26.7% and where Bill Clinton outpolled Bob Dole in the 1996 presidential election by 63.7% to 25.6%. Similarly, incumbent Democrat Gentile would defeat Marchi in a district where Marchi has previously represented about 29.4% of the district to approximately 67.4% for Gentile, and in which Clinton outpolled Dole 54.6% to 34.4% and Gore outpolled Bush 56.8% to 36.5%. [Appendix 26 contains the migration

reports for the Dollinger 62 seat plan.] Finally, Velella would clearly lose to Gonzalez, an Hispanic Democrat incumbent, in a district which is approximately 59.2% of Gonzalez' existing constituency and only 15.5% percent of Velella's existing constituency, is 55% Hispanic, and has typically voted heavily Democratic in the past (Clinton 84.7%, Gore 84.3%; even a popular Republican incumbent governor, George Pataki, was outpolled by Peter Vallone in this district 63.5% to 17.6% in the 1998 gubernatorial election). The Senate Minority's last-minute plan would have resulted in a loss of eight Republican senators from the pairings alone. As Prof. Grofman observed in his report to the Special Master, even a much more limited pairing of incumbents can be "a key indicator" of "a partisan gerrymander" (point 29). The partisan unfairness of the Senate Minority plan is unmistakable.

Significantly, the plaintiffs apparently saw the same thing, as they reduced the number of incumbent pairing in their Revised Senate plan to four: Lack/Marcellino, Hevesi/Maltese, Velella/Gonzalez and Volker/Stachowski. Lack/Marcellino and Velella/Gonzalez are discussed above. Hevesi/Maltese are matched in a district in which Clinton outpolled Dole in the 1996 presidential election by 64.2% to 26.2% and Gore outpolled Bush in the 2000 presidential election by 66.5% to 27.0%. In the case of Volker/Stachowski, they are matched in a district in which Clinton outpolled Dole 53.8% to 30.6% and Gore outpolled Bush by 56.3% to 36.4%. As discussed above, Dr. Beveridge characterized these pairings as inevitable; thus demonstrating that the Revised Plaintiffs' plan is "inevitably" worse than the 2002 Senate plan concerning the neutral principle of avoiding incumbent pairs. In any event, this plan was presented neither to the Task Force nor the Legislature, and was first disclosed in litigation after the Legislature had enacted its 2002 plan. Again, the only alternative 62 seat plan was submitted by Senator Dollinger,

as mentioned above. Even if submitted in a timely fashion, a plan that eliminates eight members of the majority cannot be expected to receive serious consideration in the redistricting process.

* * *

Dated: September 12, 2003

* * *

SUPPLEMENTAL STIPULATIONS OF UNDISPUTED FACTS

WHEREAS by Order dated October 20, 2003, the Court ordered all parties to submit a stipulation of agreed facts; and

WHEREAS the parties have submitted to the Court a Stipulation of Undisputed Facts dated October 27, 2003;

NOW THEREFORE, IT IS HEREBY FURTHER STIPULATED AND AGREED by and between counsel for Plaintiffs and counsel for Defendants, as a supplement to stipulations 1 – 176 contained in the parties' October 27, 2003 Stipulation of Undisputed Facts, as follows:

* * *

229. The Enacted 2002 Plan pairs four of the 2000 incumbents. This includes two Democrat-Democrat pairs:

(a) Senators Stavisky and Hevesi; and
(b) Senators Gentile and Lachman.

* * *

233. The Plaintiffs' Original Plan pairs fourteen of the 2000 incumbents. This includes four Republican-Republican pairs:

(a) Senators Lack and Marcellino;
(b) Senators Balboni and Hannon;
(c) Senators Hoffman and Nozzolio; and
(d) Senators Rath and Volker.

The Plaintiffs' Original Plan also includes three Democrat-Republican pairs:

(e) Senators Hevesi (D) and Maltese (R);
(f) Senators Gentile (D) and Marchi (R); and
(g) Senators Gonzalez Jr. (D) and Velella (R).

* * *

Dated: November 3, 2003

* * *

PLAINTIFFS' OBJECTIONS TO THE PRIVILEGE RULINGS OF MAGISTRATE JUDGE FRANK MAAS AND REQUESTS FOR RULINGS ON UNRESOLVED ISSUES

Plaintiffs, by and through their attorneys, hereby submit these objections to the privilege rulings made by Magistrate Judge Frank Maas.

Background

In his July 28, 2003 Opinion and Order, Judge Maas held that any legislative privilege asserted by Senator Bruno is, at best, a *qualified* privilege. *See* Jul. 28 Opinion and Order at 21. Accordingly, Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure. Judge Maas found that Plaintiffs' claims "raise[] serious charges about the fairness and impartiality of some of the central institutions of our state government," that the withheld materials are highly relevant to Plaintiffs' claims, that the materials cannot be obtained through other means, and that the presence of non-legislator members on LATFOR "tends to weaken any claim" that its deliberations and documents must remain secret. *Id.* at 23-35. "For all of these reasons," Judge Maas ordered Senator Bruno to produce all documents except those reflecting communications that "took place outside LATFOR" or "after the proposed redistricting plan reached the floor of the legislature." *Id.* at 26; *see also id.* at 29.

On August 18, 2003, this Court affirmed Judge Maas's Opinion and Order in its entirety. *See* Aug. 18 Order at 2 (*"For the reasons set forth below, the court affirms Magistrate Judge Maas's Order."*) (emphasis in original). This Court found that Judge Maas's Opinion and Order was "neither contrary to law nor clearly erroneous." *Id.* at 3. Reviewing his conclusions *de novo*, this Court held that Judge Maas "correctly analyzed the law pertaining to

legislative privilege," that "legislative privilege is not absolute," that Judge Maas considered the correct factors, and that he "appropriately balanced these factors" in concluding that the information Plaintiffs seek is discoverable. *Id.* at 3.

Subsequent to this Court's August 18 Order, Judge Maas engaged in a further analysis of which documents were created and disseminated within LATFOR (and therefore must be produced), and which documents were created and disseminated only "outside" of LATFOR (and therefore may be withheld as privileged). Applying this standard, Judge Maas ordered Defendants to produce all of the withheld documents that were sent to Debra Levine (the Executive Director of LATFOR) or Vinny Bruy (a former non-legislator member of LATFOR). Tr. Sep. 3, 2003 at 14:22-15:10, 17:21-23.

Judge Maas then engaged in a document-by-document in camera review of the remaining purportedly privileged documents. With one exception, Judge Maas held that Plaintiffs are not entitled to any of the documents that reflect requests by Senators to adjust the lines of their districts in ways they believed would enhance their chances to prevail in future elections. *See* Sep. 10, 2003 Memorandum Decision at 6.[1] Judge Maas then ordered Defendants to produce documents relating to the increase in the size of the Senate from 61 to 62 seats, finding that this "was not an issue the Senate majority sought to keep carefully cloistered," as reflected by the fact that LATFOR voluntarily posted on its website a legal memorandum that

[1] Judge Maas did order Defendants to produce one such document – a December 13, 2001 memorandum from Mr. Burgeson to Senator Skelos discussing the "removal of black population" in Queens. Judge Maas found that, with respect to this document, "the qualified privilege must yield to the plaintiffs' need for information." Memorandum Decision at 7.

Mr. Carvin sent Senators Bruno and Skelos on that subject. *Id.* at 7-8.

With respect to depositions, Judge Maas held that Plaintiffs may depose LATFOR staff, but that Plaintiffs may not depose individual legislators or the members of their staffs. *See* Tr. Sep. 11, 2003 at 12:25-14:22.[2]

Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case. We take issue with Judge Maas's rulings only in a few limited respects. To begin with, Judge Maas should have held that whatever legislative privilege applies has been waived – both because of the active role that Senator Bruno voluntarily assumed as lead defendant in this case, and because of the documents that he has selectively and strategically produced. Second, Judge Maas should have required Defendants to produce all documents relating to the specific Senate Districts that are being challenged.

Finally, in light of the substantial delay in resolving the legislative privilege issues (which Plaintiffs have taken every possible step to avoid since this Court's ruling on Defendants' motion to dismiss in June), we request that this Court resolve an important issue relating to the Burgeson deposition that Judge Maas has not yet addressed. We also request that the Court clarify that Plaintiffs may take the depositions of LATFOR fact witnesses, a process that Defendants have effectively blocked, even though Plaintiffs

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[2] As discussed below, Judge Maas has not yet ruled on the issue of the appropriate scope of the deposition of Mr. Burgeson, a LATFOR official who Defendants have now designated as a testifying expert witness. *See* Point D, *infra*. The fact that Defendants failed to produce Mr. Burgeson's expert report on August 26, as Judge Maas expressly required them to do, has made it next to impossible for the parties to complete discovery by the September 26 cutoff that this Court has ordered. *See* Point E, *infra*.

likely will not be able to finish all such depositions until shortly after the September 26 cutoff (an adjustment that will not affect the summary judgment briefing schedule in any way).

A. Senator Bruno Has Waived Whatever Legislative Privilege He May Have

Plaintiffs have repeatedly argued that Senator Bruno has waived whatever legislative privilege he may have in its entirety by willingly assuming the role of lead defendant in this case and by refusing to be dismissed from the litigation with prejudice.

In his July 28 Opinion and Order, Judge Maas initially declined to resolve Plaintiffs' waiver argument – "at least at th[at] juncture" – finding that Senator Bruno had made a "colorable" argument that his participation in this litigation was "required" by N.Y. Unconsolidated Laws § 4221. *See* Jul. 28, 2003 Opinion and Order at 26. Tellingly, Senator Bruno has since abandoned that argument, and for good reason. Putting aside that the plain language of § 4221 only requires the President of the Senate to be *served* with the complaint in a redistricting lawsuit, not to be *named* as a defendant, Senator Bruno is not even the President of the Senate. The President of the Senate is the Lieutenant Governor, Mary Donahue, not Senator Bruno. *See* N.Y. Const. art. 4, § 6 ("The lieutenant-governor shall be the president of the senate . . . ."). Accordingly, § 4221 indisputably does not apply to Senator Bruno *at all*.

Because § 4221 did not "require" Senator Bruno to participate in this litigation, his voluntary assumption of the role of lead defendant constitutes a waiver of whatever legislative privilege he might otherwise have enjoyed.[3] In *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001), the Third

[3] As noted below, Plaintiffs offered to voluntarily dismiss Senator Bruno from this litigation, with prejudice, but he declined the offer.

Circuit recently held that a legislator defendant cannot voluntarily seek to participate as a defendant in a lawsuit (by declining to assert legislative immunity) but then assert legislative privilege as a purported shield against participating in discovery:

> Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword.

Powell v. Ridge, 247 F.3d 520, 525 (3rd Cir. 2001). The Court squarely rejected the legislator defendants' contention that they should be permitted to "seek discovery, but not respond to it" or to "take depositions, but not be deposed." *Id.* at 522.

Judge Maas declined to follow the Third Circuit, relying instead on *Goldberg v. Rocky Hill*, 973 F.2d 70 (2d Cir. 1992), which, according to Judge Maas, stands for the proposition that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities (as opposed to their personal capacities). Judge Maas found that Senator Bruno's participation as a defendant did not constitute a waiver of his legislative privilege because Senator Bruno is only named in his official capacity and therefore, under *Goldberg*, could not have moved to dismiss on the basis of legislative immunity. *See*

Tr. Sep. 3, 2003 at 5:24-7:19. Judge Maas's reliance on *Goldberg* is misplaced for three reasons.

To begin with, the underlying basis for Senator Bruno's assertion of legislative privilege has always been that he *could* have asserted legislative *immunity* if he had chosen to. Indeed, each of Senator Bruno's submissions to Judge Maas and to this Court contains a lengthy discussion of the doctrine of legislative immunity and arguments about why legislative immunity "includes" a correlative legislative evidentiary privilege. *See, e.g.*, Ltr. of John Braatz to Judge Maas (Jul. 11, 2003), at 7 ("Legislative Immunity Plainly Includes Testimonial and Evidentiary Privilege"). If, under *Goldberg*, the fact that Senator Bruno is only named in his official capacity means that he does not enjoy *any* common law legislative immunity of the sort recognized in *Tenney v. Brandenhove* and its progeny, then his legislative privilege arguments fall entirely of their own weight.

Second, *Goldberg* plainly did *not* hold that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities. To the contrary, the plaintiff in *Goldberg* had agreed to *voluntarily dismiss* the individual legislator defendants (who were municipal councilmen, not state legislators) before the immunity issue reached the Second Circuit, leaving the town itself as the lone remaining defendant. *See* 973 F.2d at 71. The only holding in *Goldberg* was that the *town*, not the individual municipal legislators, had no immunity: "[W]e hold that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983." *Id.* at 74.

To be sure, the *Goldberg* opinion contains (and Senator Bruno and Judge Maas both relied upon) a quote from *Kentucky v. Graham*, 473 U.S. 159 (1985), in which the Supreme Court said, in an entirely different context, that "[t]he only immunities that can be claimed in an official-

capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. But *Kentucky v. Graham* involved the issue of official immunity for *executive* state officials, not legislators. Unlike the individual defendants in *Kentucky v. Graham*, nobody would maintain that Senator Bruno is a necessary party in this action, which challenges a state statute administered by the Executive defendants.

Finally, this Court should not take seriously the implicit premise of Senator Bruno's *Goldberg* argument – that he wished to avoid participating in this lawsuit altogether by moving to dismiss on the basis of legislative immunity, but that he read *Goldberg* and reluctantly concluded that he had no way out. That is nonsense. It is plain that Senator Bruno intentionally thrust himself into the center of the defense of this lawsuit from the very beginning, and that he did so for the simple reason that, as Majority Leader, his interests are particularly implicated by Plaintiffs' challenge to the 2002 Senate Plan.

Indeed, as this Court is aware, Plaintiffs recently requested that Senator Bruno stipulate to being dismissed from this litigation *with prejudice* under FRCP 41(a) – a stipulation that would have forever extinguished all of Plaintiffs' claims against him – but Senator Bruno expressly refused to consent to such a dismissal. *See* Ltr. of Richard D. Emery to Judge Berman (Aug. 6, 2003). If Senator Bruno had been at all disappointed by his apparent inability under *Goldberg* to move to dismiss on the basis of legislative immunity, then surely he would have snapped up Plaintiffs' offer to dismiss him voluntarily and with prejudice Rule 41(a).

Having refused to be dismissed from this case with prejudice, there is no question that Senator Bruno is precisely the kind of "self-made defendant" that the Third

Circuit held cannot hide behind the cloak of legislative privilege. *Powell*, 247 F.3d at 525.[4]

B. Senator Bruno's Selective and Strategic Document Production Constitutes a Waiver of Any Privilege Claims With Respect To Documents Concerning the 34th or 35th Senate Districts

Assuming legislative privilege has not been waived in its entirety, Senator Bruno's strategic and selective document production plainly constitutes a waiver of whatever privilege otherwise might have applied to documents concerning the 34th and 35th Senate Districts (which Plaintiffs have challenged under the Equal Protection Clause and the Voting Rights Act).

Senator Bruno produced a January 28, 2002 memorandum (Bates S21581-82) authored by Vincent Bruy, then a member of LATFOR, to Senator Skelos, the Co-Chair of LATFOR, discussing a proposal to place the largely white Town of Eastchester in Senator Spano's 35th Senate District instead of in Senator Velella's 34th Senate District, and to include an equally populated part of the City of Yonkers in the 34th Senate District instead of the 35th Senate District. *See* Hecker Decl., Exhibit A. The memorandum cites voting patterns, polling data, Mr. Bruy's previous political advice to Senator Spano, and the long-term political strategies of both

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[4] In an August 11, 2003 letter to the three-judge Court, Senator Bruno attempted to avoid the consequences of *Powell v. Ridge* by citing *United States v. Helstoski*, 442 U.S. 477 (1979), for the proposition that any waiver of legislative privilege must be explicit and unequivocal. *Helstoski* plainly is inapposite. To begin with, that case involved the assertion of an *absolute* legislative privilege under the Speech and Debate Clause of the federal Constitution, not the assertion of whatever legislative privilege arises under federal common law, which, as this Court has held, is *qualified* at best. Moreover, *Helstoski* involved the assertion of privilege by a *criminal defendant* who was not even arguably immune from prosecution and who never was offered any form of dismissal; unlike here, it cannot be said that the defendant's participation in the criminal prosecution in *Helstoski* was in any way *voluntary*.

Senator Velella and Senator Spano. Defendants undoubtedly released this document in order to try to establish that Senate District 34 was drawn predominantly on the basis of political considerations and not, as Plaintiffs allege, predominantly on the basis of race.

Notwithstanding his strategic production of Mr. Bruy's January 28, 2002 memorandum, Senator Bruno nonetheless has asserted privilege and refused to produce any other memoranda that similarly are "between a Senator (or aide) and Mr. Burgeson or Mr. Bruy" – presumably because such memoranda are disadvantageous to his defense. Ltr. of John Braatz to Judge Maas (Aug. 25, 2003) at 4 (*see* Hecker Decl., Exhibit B).

By selectively producing only those supposedly "confidential" documents that he believes will help his case, Senator Bruno plainly is seeking, in the words of the Third Circuit, "to turn what has heretofore been the shield of legislative immunity into a sword." *Powell*, 247 F.3d 520, 525. Senator Bruno cannot rely affirmatively on those "confidential" documents that he likes but selectively withhold as privileged those documents he does not like. In light of his selective production, Judge Maas should have directed Senator Bruno to produce all documents relating to the 34th and 35th Senate Districts.[5]

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[5] During a conference call with Judge Maas, Mr. Carvin asserted that no waiver could result from the production of the January 28, 2002 Bruy memorandum because it was produced "only under compulsion" and "because it's under court order." Tr. Aug. 27, 2003 at 58:10-16. Contrary to Mr. Carvin's statement, Senator Bruno was never specifically ordered to produce the January 28, 2002 Bruy memorandum. Rather, Senator Bruno *chose* not to assert privilege with respect to that document and *chose* instead to produce it. During the same colloquy, Mr. Carvin also suggested that "the only reason" that Senator Bruno did not withhold the document as privileged was that "it was from a non-legislator to a legislator, which is different than all the documents we're withholding." *Id.* at 58:11-13. We gather that Mr. Carvin misspoke, and that he did not mean to concede that each of the many memoranda on the revised privileged log between non-legislators and legislators is not

C. Judge Maas Should Have Ordered Defendants to Produce Documents Relating to the Districts That Plaintiffs Have Challenged

As we have repeatedly observed, the qualified privilege analysis that governs this case requires the Court to balance Defendants' asserted need for secrecy against Plaintiffs' need to discover evidence to prove their claims. The five factors that must be balanced are: (1) the relevance of the evidence at issue; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government actors who will recognize that their secrets are discoverable. *See* Jul. 28, 2003 Opinion and Order at 21-22; Aug. 8 Order at 3.

Documents reflecting Senators' requests to move the borders of the districts that Plaintiffs are challenging could hardly be more relevant to their claims. Although Plaintiffs need not necessarily prove discriminatory intent in order to prevail on their Voting Rights Act claims, Judge Maas correctly recognized that Plaintiffs may prevail on their Voting Rights Act claims by fulfilling *either* the "intent test" or the "results test," and that contemporary statements by legislators therefore are "highly relevant." Jul. 28, 2003 Opinion and Order at 24. This holding directly applies to documents reflecting requests to move borders, which obviously are central to Plaintiffs' Equal Protection Clause challenge to the 34th Senate District – a claim that requires proof that the district was drawn predominantly on the basis of race.

Plaintiffs readily accept, as Judge Maas held, that there is no substantial need for Plaintiffs to discover

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(continued...)

privileged and should be produced. In any event, there is no basis to distinguish the January 28, 2002 Bruy memorandum that Senator Bruno did produce from the similar memoranda that he refuses to produce.

documents pertaining to districts that are not challenged in this lawsuit. But by failing to distinguish between discovery that pertains to challenged districts (which could include documents concerning districts adjacent to the challenged districts) and discovery that does not, Judge Maas necessarily failed to engage in the required balancing analysis, the very heart of which is the relevance inquiry. Because Plaintiffs have established a substantial – indeed, compelling – need for discovery relating to the districts they have challenged, Judge Maas should have ordered that those documents be produced.

D. Because Judge Maas Has Not Yet Ruled On the Scope of Mr. Burgeson's Expert Deposition, and Because Time Is of the Essence, This Court Should Resolve That Issue So the Deposition Can Proceed

As this Court is aware, Judge Maas ordered Defendants to produce Mark Burgeson – one of the chief architects of the 2002 Senate Plan, who has been a LATFOR employee since 1980 and who currently serves as Special Assistant to LATFOR Co-Chairman Skelos – to be deposed on a single, limited subject: the nature of LATFOR's operations. Through this limited deposition, Judge Maas wished to obtain more information about the way LATFOR operated in order to determine whether the documents over which Senator Bruno has asserted legislative privilege were created and disseminated "within" LATFOR or "outside" LATFOR – a distinction that Judge Maas found important in his privilege analysis. Mr. Carvin agreed to produce Mr. Burgeson on the limited subject of the nature of LATFOR's operations, but Mr. Carvin refused to permit Plaintiffs to question Mr. Burgeson about his intimate role in the design of the 2002 Senate Plan. *See* Tr. Sep. 3, 2003 at 9:15-24. This limited deposition of Mr. Burgeson took place on September 5, 2003.

After Mr. Burgeson's limited deposition was completed, Defendants revealed for the first time that they intend to use Mr. Burgeson as an expert witness in this case. According to Mr. Carvin's September 10, 2003 letter to Judge Maas (*see* Hecker Decl., Exhibit C), Mr. Burgeson's role as an expert witness will be to provide a purportedly "objective" assessment "of the enacted and alternative plans based upon accepted redistricting principles and publicly available information." Mr. Carvin nonetheless argued to Judge Maas that "Mr. Burgeson's involvement as an expert does not affect the application of legislative privilege to the fact discovery sought by Plaintiffs," because he "will not touch in any way upon the deliberative process or motivations of legislators or their aides in the development and enactment of the challenged plan."

In light of Defendants' designation of Mr. Burgeson as an expert witness, Plaintiffs plainly are entitled to the production of all purportedly privileged documents sent by or to Mr. Burgeson regarding the 2002 Senate Plan, and Plaintiffs plainly are entitled to depose Mr. Burgeson about his role in the redistricting process. When Defendants say that Mr. Burgeson's expert testimony will consist of an "objective assessment of the enacted and alternative plans based upon accepted redistricting principles and publicly available information," what they really mean to say is that he will testify about how an *outsider*, without the benefit of full information, could *characterize* the 2002 Senate Plan as having been drawn. But Mr. Burgeson is no outsider; to the contrary, he concededly was one of the chief architects of the challenged plan. Plaintiffs thus are plainly entitled to cross-examine Mr. Burgeson about whether his "objective" analysis of the plan is consistent with his *subjective* knowledge of how the plan *actually* was drawn.

As Plaintiffs argued to Judge Maas in Mr. Hecker's letter dated September 10 (*see* Hecker Decl., Exhibit D), whether Mr. Burgeson's "objective assessment" is consistent

with his *own actions in this very litigation* could hardly be more probative of the credibility of his expert opinion. Mr. Burgeson cannot be allowed to provide an "objective" analysis of the 2002 Senate Plan, based only on publicly available information, when he may well know for a fact that the inferences he purports to draw about how the plan was crafted are inconsistent with the deliberations that actually took place.

In footnote 1 of his September 10 Memorandum Decision, Judge Maas reserved decision on this issue. During a conference call the following day, Judge Maas explained that he did not believe the issue would be ripe for adjudication until Mr. Burgeson's expert report was produced on September 12. *See* Tr. Sep. 11, 2003 at 15:21-16:13.

Defendants produced Mr. Burgeson's expert report on September 12 (see Hecker Decl., Exhibit E), and it confirms beyond any doubt that the Burgeson materials that have been withheld on privilege grounds must be produced. In his expert report, Mr. Burgeson opines at length about *his activities* with LATFOR and about the activities of others to which he was privy. Indeed, his entire report is a defense of the 2002 Senate Plan, of which he was the primary draftsman. Because the information relied upon in Mr. Burgeson's report necessarily overlaps with the information he used when drawing the Senate districts, it cannot seriously be disputed that his designation as a testifying expert constitutes a waiver of whatever legislative privilege he might otherwise have been entitled to assert. Mr. Burgeson cannot be permitted to provide selective, sanitized testimony about the supposed nature of the 2002 Senate Plan but refrain from producing and being questioned about contemporaneous documents or instructions that he authored or received and that may well contradict his theoretical opinion.

Although Judge Maas has yet to rule on this issue, at this point we believe it would be prudent for this Court to resolve it. Objections to Judge Maas's ruling likely will be taken no matter what he decides, and there is not nearly enough time left in the discovery schedule to await the resolution of a further round of objections before proceeding with this expert deposition. Plaintiffs respectfully request that this Court order Defendants to produce all of the withheld documents that were authored by or sent to Mr. Burgeson, and to permit him to be questioned about those documents and about any other aspects of his intimate role in the 2002 redistricting.

E. To the Extent That Any of Senator Bruno's Assertions of Legislative Privilege Are Rejected, the Court Should Permit Plaintiffs, If Necessary, To Continue To Take Depositions After September 26

Despite Plaintiffs' best efforts to complete document and deposition discovery before the September 26 cutoff, and through no fault of their own, it is now likely that doing so will not be possible. Although Judge Maas ruled long ago that Senator Bruno's assertions of legislative privilege would be rejected at least in substantial part (a ruling that this Court affirmed), and although Judge Maas has ordered him to produce a variety of purportedly privileged documents, Senator Bruno has refused to turn over the vast majority of those documents pending resolution by this Court of his objections to Judge Maas's rulings. Plaintiffs effectively are precluded from taking fact witness depositions until documents have been produced. And in any event, *Defendants have expressly refused to comply* with Judge Maas's order that they produce LATFOR staffers for deposition, pending resolution by this Court of their objections to that ruling. *See* Tr. Sep. 11, 2003 at 12:4-11.

Making matters significantly worse, Defendants flouted Judge Maas's order that they produce by August 26

all expert reports that do not respond to Plaintiffs' expert racial bloc voting analyses. As detailed in Mr. Emery's letter to Judge Maas dated September 16, 2003 (*see* Hecker Decl, Exhibit F), Defendants did not produce Mr. Burgeson's expert report (which does not even arguably speak to racial bloc voting) until September 12 – two and a half weeks past the deadline. Indeed, Defendants did not even reveal that they were planning to use Mr. Burgeson as an expert witness until September 5, by which time the parties had been litigating privilege issues relating to Mr. Burgeson *for months*. Had Defendants identified Mr. Burgeson as an expert and produced his report by August 26 as Judge Maas ordered them to do, all of the Burgeson privilege issues could have been advanced, and we would not now find ourselves, one week before the discovery cutoff, without the ruling from this Court that Defendants insist is necessary before documents and witnesses will be produced.[6]

Plaintiffs have proposed a simple solution to Defendants: to the extent that this Court orders any documents to be produced and allows any depositions of LATFOR staffers to go forward, Plaintiffs should be permitted to take those depositions after September 26, if necessary. Importantly, the modest accommodation Plaintiffs seek *would not affect the summary judgment schedule in any way*, for there is no reason why Defendants cannot work on their summary judgment papers while LATFOR staffer depositions are being finalized. Inexplicably, Defendants refused to join Plaintiffs in this request to this Court, stating only that they believe the September 26 cutoff is "binding on both sides."

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[6] It should be noted that Senator Bruno has moved to preclude a supplemental expert report submitted by Plaintiff-Intervenor PRLDEF, arguing that the supplemental report "obviously" would cause him to "suffer severe prejudice" because "there are only 10 days remaining in the discovery period." *See* Ltr. of Louis Fisher to Judge Maas (Sep. 16, 2003) (*see* Hecker Decl., Exhibit G).

It bears emphasis that Plaintiffs have seen this problem lurking on the horizon for quite some time and have done everything humanly possible to avoid it. When Judge Maas first indicated during the August 27 teleconference that he intended to defer making definitive privilege rulings until Mr. Burgeson could be deposed regarding the nature of LATFOR's operations, Plaintiffs immediately wrote a letter to Judge Maas urging him not to wait an entire week for the Burgeson deposition (Defendants were unable to produce him sooner) because "precious time will be lost between now and then." *See* Ltr. of Richard Emery to Judge Maas (Aug. 27, 2003) at 2 (*see* Hecker Decl., Exhibit H); *see also* Tr. Aug. 27, 2003 at 51:6-12. Because Judge Maas did not issue his written privilege rulings until September 10, Plaintiffs pressed for a compressed schedule through which objections would be fully briefed by September 12, but Defendants would not agree to that schedule (because they were too busy deposing Plaintiffs' experts). *See* Tr. Sep. 11, 2003 at 10:1-11:1. This is precisely the "doomsday scenario" that Plaintiffs have repeatedly warned about and sought to avoid. *See* Tr. Sep. 3, 2003 at 48:15-22.

Although they refuse to consent to Plaintiffs' modest and eminently reasonable proposal, Defendants sought to extend fact discovery for themselves. In fact, Defendants have demonstrated that they agree with Plaintiffs that fact discovery cannot be completed until the privilege issues are resolved. In his September 5 letter to Judge Maas identifying Defendants' expert and fact witnesses (*see* Hecker Decl., Exhibit I), Mr. Carvin expressly reserved the right to supplement his lists, observing that he could not provide a complete list "until . . . the legislative privilege issue is resolved." If Defendants cannot even identify their witnesses until these issues are resolved, then surely Plaintiffs cannot be expected to complete document and deposition discovery until these issues are resolved.

CONCLUSION

For the reasons set forth above, Plaintiffs objections to Judge Maas's privilege rulings should be sustained, and the September 26 discovery cutoff should be extended briefly to allow Plaintiffs to depose fact witnesses who Defendants have refused to produce.

Dated: September 17, 2003
New York, New York

* * *

September 22, 2003

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Dear Chief Judge Walker, Judge Berman, and Judge Koeltl:

This firm represents the Plaintiffs in this matter. We write briefly to note our limited objection to Judge Maas's Discovery Order dated today.

In the objections we submitted to this Court on September 17, we argued that Defendants' designation of Mr. Burgeson as a testifying expert witness constitutes a waiver of whatever legislative privilege otherwise would have applied to the documents and testimony relevant to his earlier activities as primary draftsman of the Senate Plan. As we pointed out, Mr. Burgeson cannot be permitted to offer a purportedly "objective" analysis of how the 2002 Senate Plan appears to have been drawn without also providing information about how he, as chief architect of the plan, *actually drew it*. *See* Sep. 17 Objections, Point D, at 11-13; *see also* Sep. 18 Reply, Point C, at 7-9.

In the Order he issued today, Judge Maas held, without explanation, that Mr. Burgeson's designation as a testifying expert witness "does not open the door for the plaintiffs to inquire into the reasons why he . . . drew the lines for particular Senate districts in the ways that [he] did." Discovery Order (9/22/03) at 4. We respectfully object to that ruling. Judge Maas offered no reason at all, much less a persuasive reason, why questioning about Mr. Burgeson's concededly intimate role in the redistricting is not directly probative of the credibility of his expert opinion and why it is not expressly permitted, notwithstanding any assertion of privilege, by Rules 26(a)(2)(B) and 26(b)(4)(B) of the Federal Rules of Civil Procedure.

This is especially true in light of Mr. Burgeson's express concession during his limited deposition last Friday

that *there is "no way" he could "separate" his experience as chief architect of the plan with his preparation of his expert report.* Tr. 9/19/03 at 14:25-15:23 (emphasis supplied) (relevant excerpts attached hereto as Exhibit A).

For these reasons, and for the reasons stated in our previous papers, this Court should rule that Plaintiffs are entitled to depose Mr. Burgeson as any other expert in any other litigation would be deposed – including questioning about prior experience in drafting the redistricting plan that is the heart of this case. Defendants cannot wield Mr. Burgeson's expert report as a sword but seek to hide him behind the shield of legislative privilege. *See Powell v. Ridge*, 247 F.3d 520, 525 (3rd Cir. 2001)

Finally, a quick word on depositions. In our papers, we explained why we believe that this Court should allow Plaintiffs to take depositions after the discovery cutoff with respect to the fact witnesses who Defendants would not allow to be deposed, despite Judge Maas's order, pending the resolution of objections to this Court. In their reply, Defendants requested that discovery not take place during the week of September 29 because they will be working on their summary judgment papers. *See* Defendants' Reply (9/18/93) at 13. We have no objection to this request. If this Court does not rule in time for Plaintiffs to depose fact witnesses by September 26, then we would agree to take those depositions during the week of October 6 (which would not in any way affect the summary judgment schedule).

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